

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1426

ADOPTION OF EDNA.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal arises from a decree finding the mother unfit to assume parental responsibilities for her daughter, Edna, and dispensing with the mother's consent to adoption. Although the mother concedes that she was unfit at the time of trial, she contends that she had been making progress and was imminently approaching fitness, and that the evidence was insufficient to show that her unfitness would continue indefinitely. We affirm.

Background. We recite the facts as the judge found them after trial. Until recently the mother's life was marked with instability and strife, including the lack of any stable home life.<sup>2</sup> The mother also has an extensive history of substance abuse and mental illness that long predates the birth of her

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<sup>1</sup> A pseudonym.

<sup>2</sup> The mother was almost thirty years old at the time of trial.

children.<sup>3,4</sup> The mother has been psychiatrically hospitalized numerous times, and has attempted suicide on several occasions.

Edna was born in May 2017. The mother tested positive at birth for several substances including methadone and cocaine, and Edna was diagnosed with neonatal abstinence syndrome, and treated for withdrawal symptoms. The mother left the hospital without explanation eight days after Edna's birth,<sup>5</sup> while the child remained in the intensive care unit. The mother was found wandering the hospital in a daze the following day -- she later admitted that she had attempted suicide by overdose during the time she was gone. The mother was then transferred to Arbour Hospital and remained there for one month. The Department of Children and Families (DCF) assumed custody of the child, and subsequently opened the case for services on June 9, 2017. The initial action plan for the mother was that she follow the recommendations of Arbour Hospital following her discharge.

Upon her discharge on June 21, 2017, the mother moved to Cape Cod to live with the maternal great grandmother. The critical path for the mother under the action plan required her

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<sup>3</sup> The mother also has a four year old daughter who was removed at birth due to the mother's substance abuse. The mother relinquished her parental rights to this older child in March 2017, and the child was adopted.

<sup>4</sup> The mother's drug use began at age eleven and is comprehensive. Her diagnosed mental illnesses include posttraumatic stress disorder, bipolar disorder, and depression, among others.

<sup>5</sup> The mother herself was still a hospital patient at the time.

to address her significant substance abuse and mental health issues. The mother began some treatments; however, from the beginning her engagement with services was incomplete. The mother did not enroll in an intensive outpatient program (IOP) as recommended, and her attendance at AA/NA meetings was not sufficiently regular. In September of 2017 the mother's case was transferred to the Cape and Islands DCF office, whereupon a newly-assigned social worker added a number of tasks to the mother's action plan. Through November 2017, however, the mother had yet to make significant progress.<sup>6</sup> The mother remained on the same dosage of methadone. She had not performed many of her action plan tasks, had not taken steps to address her mental health issues, and had missed several visits with Edna.<sup>7</sup> That month the goal was changed from reunification to adoption.

Between December of 2017 and trial in May of 2018 the mother made some progress toward compliance with her action

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<sup>6</sup> Of the fifteen tasks in her September 2017 action plan the mother failed to complete, or to verify, most of them. At a November permanency meeting the mother failed to provide drug screens, full releases for her records, verification that she had seen a therapist, that she attended any IOP or AA/NA meetings, or that she participated in a trauma evaluation.

<sup>7</sup> The mother missed several visits between October and December of 2017 after the location of visitation was moved to accommodate the child. The mother had no transportation and was reluctant to use the public transportation offered by DCF for fear that the ride through Boston would trigger her addictions.

plan.<sup>8</sup> Nonetheless, a number of key tasks remained uncompleted at the time of trial. The mother had not participated in any IOP programs, partial hospitalization programs, or trauma-focused therapy, and only attended about one-half of the required parenting classes and AA/NA meetings.

The mother also had two notable breaks from reality during early 2018. In March of 2018 she was found "confused" and "out of it" in a car parked in a fast food restaurant drive-through lane. The judge noted that during trial in May, the mother's speech was "slow, lethargic, and fragmented" and that she "spaced out" at one point during questioning. The judge found that both episodes were likely the result of problems with the mother's medication, and with her ongoing mental health issues.

On the other hand, at trial the mother also presented significant evidence of improved stability in her life. The mother had maintained sobriety for several months. She was living in a stable home with the maternal great grandmother, had ended her previous unhealthy relationships, was engaging with her local church community, and had obtained a driver's license. She was also participating in some treatments for her mental health and substance abuse.

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<sup>8</sup> The mother provided several months of clean drug screens in January, began seeing an individual therapist, and provided all of the necessary releases.

Two weeks after the conclusion of the trial, the judge issued a decree terminating the mother's parental rights. The mother filed a timely notice of appeal. On August 7, 2018, the judge issued a thorough, forty-seven page decision with 117 findings of fact, detailing how the record as a whole supported his decision.

Discussion. Parents have a fundamental liberty interest in their relationship with their child; that interest is not absolute, however, and may be terminated under certain circumstances. See Custody of Two Minors, 396 Mass. 610, 617 (1986). The termination of parental rights is appropriate where there is clear and convincing evidence that the parent is unfit to care for the child, and where termination is in the child's best interests. Adoption of Virgil, 93 Mass. App. Ct. 298, 301 (2018). The judge must also find that the parent's unfitness is not temporary, but is likely to continue into the future. Id. "Consideration of future fitness, however, should never be made at the expense of the child, whose interest is paramount" (citation omitted). Id. at 302. We give substantial deference to a judge's decision that termination of parental rights is in the best interests of the child, and will only reverse where there is a clear factual error, abuse of discretion, or other error of law. Adoption of Ilona, 459 Mass. 53, 59 (2011).

On appeal, the mother concedes that she was unfit to assume parental responsibility at the time of trial in May of 2018, but goes on to argue that the judge incorrectly found that her unfitness was likely to continue. The mother contends that the evidence established that her unfitness was a temporary, remediable condition stemming from her mental health and substance abuse issues, and that her recent strides toward sobriety and stability demonstrated that she had "turned her life around," and was imminently approaching fitness.

Accordingly, the thrust of the mother's argument is a direct challenge to the judge's finding that the mother's conceded unfitness was likely to continue. On this record, we cannot say that the judge committed any legal error, nor do we discern any material factual error or abuse of discretion. See Adoption of Raissa, 93 Mass. App. Ct. 447, 456 (2018). By the time of trial in May of 2018, the mother undoubtedly showed progress, commendable progress, with her substance abuse, mental health, and home life issues. But at the time of trial that progress had been short-lived, particularly when viewed, appropriately by the judge, through the longer lens of many years of a lifestyle that was self-destructive and chaotic, and that left her unable to properly care for Edna. The mother's older daughter had been removed from the mother's custody at birth due to the mother's substance abuse issues, in 2015. See

note 3, supra. Just one year before trial, the mother's drug addiction had led to Edna's birth as a drug-addicted infant, and later, to the abandonment of Edna and to the mother's hospitalization.

Equally important, as the judge found, the mother's progress after Edna's birth was marred by her failures to attend to several important aspects of the DCF action plan. The judge found that the mother failed to follow DCF's recommendations that she begin an IOP to address her addiction. She never enrolled in any of the intensive rehabilitation programs suggested by DCF, even after DCF offered her an alternative. The mother was not appropriately forthcoming with her medical information and could not verify a number of her claims, including the length of her sobriety. The mother's attendance record at required parenting classes and AA/NA meetings was incomplete, and it was evident at trial that she had not learned some of the skills necessary to assume parental responsibilities.<sup>9</sup> The mother remained noncompliant from the time the action plan was revised in September of 2017 until trial in May of 2018.

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<sup>9</sup> At trial the mother could not provide a narrative of what she had learned in the parenting classes and could not identify any age-appropriate information regarding Edna's care.

Accordingly, the judge's determination that the mother's unfitness was likely to continue was supported by evidence that even after Edna was born the mother did not take the steps necessary to remedy the underlying causes of her unfitness. The mother did not show that she had learned sufficiently from her parenting classes or had a plan to care for Edna's special needs upon her return, she failed to reduce her reliance on methadone, and her ongoing mental illness and overmedication affected her in ways that would put a child in her care at risk. See Adoption of Jacques, 82 Mass. App. Ct. 601, 608-609 (2012). See also Adoption of Virgil, 93 Mass. App. Ct. at 302, quoting Adoption of Inez, 428 Mass. 717, 723 (1999) ("A judge may not decline to dispense with consent [to adoption] based on a faint hope that the family will succeed if reunited. . . . Consideration of future fitness . . . should never be made at the expense of the child, whose interest is paramount").

We also disagree with the mother's contention that DCF did not demonstrate a link between her history of addiction and mental illness and her ability to assume parental responsibilities in the present and future. Past behavior can have prognostic value, particularly where "the evidence support[s] the continuing vitality of such conduct." Adoption of Larry, 434 Mass. 456, 469 (2001). Moreover, "[a] judge . . . need not wait for disaster to happen but may rely upon past

patterns of parental neglect or misconduct in determining current or future fitness." Adoption of Virgil, 93 Mass. App. Ct. at 301. That is the case here -- because the mother has not adequately addressed the root issues that engendered her past patterns of neglect and unfitness, the judge did not err in concluding they were likely to continue.<sup>10</sup>

Finally, we also conclude that the judge did not abuse his discretion in finding that DCF's adoption plan was in Edna's best interests. See Adoption of Malik, 84 Mass. App. Ct. 436, 440 n.9 (2013). That plan was for Edna to be adopted by the same family that had adopted her older sister. The finding was supported by evidence of familial bonding between the sisters,

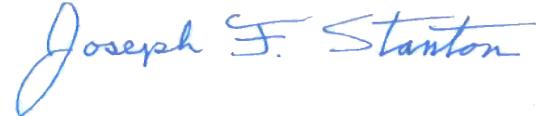
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<sup>10</sup> The mother also challenges seventeen of the judge's factual findings as clearly erroneous. We have reviewed the mother's arguments and find that even if it can be shown that some of these findings were clear error, Custody of Eleanor, 414 Mass. 795, 799 (1993), any error would not materially undermine the judge's decision, and the remaining unchallenged findings are sufficient to support it. The mother does not challenge findings regarding her substance abuse, employment history, mental health history, or her behavior with Edna and the older child through June of 2017. The mother also does not challenge many of the findings demonstrating lack of compliance with her action plan, nor does she contest that she had insufficient plans to care for Edna should custody be returned.

and that the adoptive parents are willing to take custody and committed to raising Edna with her sister.

Decree affirmed.

By the Court (Sullivan, Singh & Englander, JJ.<sup>11</sup>),

  
Clerk

Entered: July 11, 2019.

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<sup>11</sup> The panelists are listed in order of seniority.